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No. 82-799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT:	
A. The FLRA's decision should be affirmed because it was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law	6
B. The FLRA's finding that federal sector negotiations constitute "official business" is reasonably defensible and should be affirmed	13
C. Official time status as provided in 5 U.S.C. § 7131 is on-duty status and therefore includes payment of necessary travel and per diem expenses	19
D. The FLRA's decision on official time effectuates the purposes of the statute	25
CONCLUSION	30

TABLE OF AUTHORITIES

Cases: Page

Archer v. Airline Pilots Assn., 102 LRRM 2827 (9th Cir. 1979) 29

Bureau of Alcohol, Tobacco, and Firearms v. FLRA, 672 F.2d 732 (9th Cir. 1982) 8

Bureau of the Mint v. FLRA and AFGE, No. 82-1194 (pending, D.C. Cir.) 2

Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom., AFGE v. FLRA*, 102 S. Ct. 1443 (1982) 6, 7, 8, 12

Division of Military and Naval Affairs v. FLRA, 683 F.2d 45, petition for cert. pending, No. 82-1021 2

EEOC v. Louisville & Nashville R. Co., 505 F.2d 610 (5th Cir. 1974) 7

Florida National Guard v. FLRA, No. 81-5466, No. 81-5466 (11th Cir., March 7, 1983) 8

Griggs v. Duke Power Co., 401 U.S. 424 (1970) 6

Miller v. Youakim, 440 U.S. 125 (1979) 7

NFFE v. FLRA, 652 F.2d 191 (D.C. Cir. 1981) 6, 7, 12

Norwegian Nitrogen Products Co. v. U.S., 288 U.S. 294 (1933) 6

Patco v. FLRA, No. 81-2135 (D.C. Cir., June 11, 1982) 28

Perry Education Assn. v. Educators' Assn., 112 LRRM 2766 (Sup. Ct., February 23, 1983) 4, 16, 17

Power Reactor Development Co. v. Int'l Union of Elec., Radio & Machine Workers, 367 U.S. 396 (1961) 6, 7, 12

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 7

Udall v. Tallman, 380 U.S. 1 (1965) 6

U.S. v. City of Chicago, 500 U.S. 8 (1970) 6

U.S. Department of Agriculture v. FLRA, 691 F.2d 1242, petition for cert. pending, No. 82-979 ..... 2, 8

Decisions of the FLRA:

AFGE and Social Security Administration, 3-CO-20003 (case pending) 30

TABLE OF AUTHORITIES—Continued

Page

Dept. of the Air Force, Air Force Plant Representative Office Detachment 27, Fort Worth, Tx. 5 FLRA No. 62 (1981) 29
Interpretation and Guidance, O-PS-3 & 6, 2 FLRA No. 31 (1979) ..... *passim*
Veterans Administration, 1 FLRA No. 55 (1979) .. 4, 25

Statutes:

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 17
Civil Service Reform Act of 1978, 5 U.S.C.:
§ 706 ..... 6, 8, 9, 12
§ 706(2)(A) 6
§ 5596(b)(1)(B) 19
§ 5701 ..... 9, 10, 13, 17, 18
§ 5702 ..... 8, 10, 11, 12, 14, 17
§ 5704 ..... 14, 17
§ 5707 ..... 14, 17
§ 7101 ..... 12, 14, 15, 16, 17
§ 7101(a) 11, 15, 26
§ 7101(a)(1) 15
§ 7101(a)(1)(A) 15, 24
§ 7101(a)(1)(B) 15, 24
§ 7101(a)(2) 15, 24
§ 7102(2) 17
§ 7103(a)(9) 17, 29
§ 7105(a) 9, 11, 18, 25
§ 7106 ..... 17, 28
§ 7113 17
§ 7114 ..... 12, 13, 17
§ 7116(a)(5) 12, 17
§ 7116(b)(5) 12, 17
§ 7116(b)(7) 28
§ 7121(a) 17
§ 7121(e) 30
§ 7123 9
§ 7123(c) 6, 12
§ 7131 ..... 10, 11, 14, 18

TABLE OF AUTHORITIES—Continued

	Page
§ 7131(a)	14, 16
§ 7131(b)	14
§ 7131(c)	14
§ 7131(d)	14
§ 7135(b)	17
29 U.S.C. § 158(a)(3)	29
Executive Orders:	
E.O. 11491	10, 14, 16, 17
E.O. 10988	21, 23
Comptroller General Decisions:	
46 Comp. Gen. 21, B-156287, July 12, 1966	10, 22
C.G. Decision B-156287, June 15, 1981	17
Miscellaneous:	
Federal Personnel Manual:	
FPM Supplement 296-33, Subchapter 6, S6-1.5	19
FPM Supplement 831-1, Subchapter S3-2	19
FPM Supplement 990-2, Subchapter S1-13	20, 21
FPM Supplement 990-2, Book 630, Subchapter 11	21
FPM Letter 711-5	22, 23, 24, 25
GSA Travel Regulations § 1-2.2, FPMR, temp Reg. A-11, Supp. 4, Attachment A (April 28, 1977)	14, 17
H.R. Rep. No. 95-1403, 95th Congress, 2d Sess. 38 (1978)	16
124 Cong. Rec. H9, 638 (daily ed. Sept. 13, 1978)	26
124 Cong. Rec. 9633 (daily ed. Sept. 13, 1978)	26

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36.2, written consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO (AFGE) files this brief as amicus curiae in support of the Federal Labor Relations Authority (FLRA) and in opposition to the position of the Bureau of Alcohol, Tobacco, and Firearms (BATF).

INTEREST OF THE AMICUS CURIAE

AFGE is a labor organization affiliated with the AFL-CIO. AFGE is the largest federal sector union representing more than 700,000 employees of the federal government. AFGE is obligated by 5 U.S.C. § 7101 *et seq.* to

fairly negotiate and administer collective bargaining agreements covering its bargaining unit members—including nationwide, master agreements in the Social Security Administration, Veterans Administration, Equal Employment Opportunity Commission, etc. AFGE files this brief because this Court's ruling will have a direct effect on its employee representatives' entitlement to travel and per diem expenses while participating in the negotiation of collective bargaining agreements pursuant to 5 U.S.C. §§ 7114 and 7131.

AFGE is already a party in a case involving the identical issue pending before this Court on petition for writ of certiorari involving the Eight Circuit's decision in *U.S. Department of Agriculture v. FLRA*, 691 F.2d 1242, petition for cert. pending No. 82-979. AFGE was also granted amicus curiae status and filed briefs in the following cases involving the exact issue now before this Court: *Div. of Military & Naval Affairs v. FLRA*, 683 F.2d 45, petition for cert. (from the Second Circuit) pending No. 82-1021; *Florida National Guard v. FLRA*, No. 81-5466 (11th Cir., March 7, 1983). AFGE is also a party in an action on this same issue pending in the D.C. Circuit and stayed until this Court issues its decision in the instant case, *Bureau of the Mint v. FLRA and AFGE*, No. 82-1194.

In view of the above, it is clear that AFGE has a direct and compelling interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

1. Amicus AFGE contends that the FLRA's decision below must be affirmed under the standard for judicial review of FLRA decisions set forth at 5 U.S.C. § 7123(c). Under § 7123(c), FLRA decisions shall only be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Further, under the past decisions of several Circuits, FLRA decisions are entitled to great deference and should not be set

aside if "reasonably defensible." *E.g., DOD v. FLRA, infra.*

AFGE maintains that where, as here, there is disagreement over the interpretation and scope of terms of art employed in § 7131 of the FLRA's statute, the FLRA acts reasonably under 5 U.S.C. § 7105(a)(1) and (a)(2)(I) in choosing the interpretation it believes best effectuates the purposes of the legislation absent clear evidence of contrary Congressional intent. In the instant case, petitioner has not put forward any such evidence.

Four Circuits have decided this issue: The Second, Eighth, Ninth, and Eleventh. The Ninth Circuit, in the decision currently under review, unanimously upheld the FLRA's ruling that the statute's grant of official time for negotiations includes necessary travel and per diem payments. The Ninth Circuit, quoting from a number of D.C. Circuit decisions, found the FLRA's decision reasonably defensible and entitled to deference. The Second and Eighth Circuits (over vehement dissents in each) and a unanimous Eleventh Circuit panel found that the FLRA decision was not entitled to deference because it depended upon another statute, 5 U.S.C. § 5702. In this regard, we show that application of § 5702 was simply a ministerial matter, and the Second, Eighth and Eleventh Circuits were clearly wrong in determining that the FLRA was not interpreting its own Statute and were wrong, therefore, in not according the FLRA decision due deference.

2. In light of the context of the Reform Act, and the clear pronouncements contained in 5 U.S.C. §§ 7101, 7114, and 7131, the FLRA did not err in concluding that negotiators in the Federal sector are engaged and participating in the official business of the government. Federal sector negotiations are unique in that only subjects of *mutually* beneficial interest are generally negotiable, such as: affirmative action/equal employment opportunity health and safety, grievance dispute resolution, fair and

equitable personnel actions, merit promotion, reprisal free work environment, etc. It is significant that most traditional "partisan" private sector subjects of bargaining are generally *not* negotiable, such as: seniority, performance standards, pay, retirement, fringe benefits, right to strike, union security, etc. Thus, the FLRA's opinion is clearly reasonable and in full accord with the Supreme Court's recent findings in *Perry Education Association*, 103 S.Ct. 948 (1983), wherein the Court found a public sector union to be engaged in the official business of the government employer.

3. AFGE's Brief also traces the history of this issue and establishes that the FLRA is not exercising any more authority in this area than the now defunct Civil Service Commission exercised under an Executive Order. *See* FPM Letter 711-5 August 1, 1966. Based on Executive Order 10988, the CSC found that the Government could provide travel and per diem to union negotiators where such payments were in the Government's interest. Here, the FLRA emphasized that Congress has expressly declared at 5 U.S.C. § 7101 that collective bargaining is in fact in the public's interest. Moreover, the FLRA reasoned, negotiators on both sides who are actually on *duty time* under § 7131(a) should be treated equally, are not in a "paid leave" status, and so should be entitled to payment of their on duty official travel and per diem expenses.

4. The BATF's main argument—that the FLRA's decision will lead to great expense—is easily dismissed when viewed in actual operation out in the real world. Thus, in view of all the circumstances involved, there is no evidence that the FLRA decision will cost any more money. As the FLRA has recognized in the past, under a system where consolidated negotiations at the single highest or national level are in the public interest and favored, *Veterans Administration*, 1 FLRA No. 55 (1979), p. 35, it is

necessary that the union's local representatives from all over the country appear. However, the centralized operations of the government allow it in most agencies to have all its negotiators located at one location already (such as VA's central office in Washington, SSA's in Baltimore, and Justice's in Washington.) Thus, if travel and per diem for union negotiators were not authorized, the union—having to bear the entire travel burden—would be fully within its rights to insist, for example, that VA negotiations be held in a geographically centralized location equally burdensome to both sides, such as Kansas City or Chicago. Thus, practically speaking, the VA would be required to spend just as much or more money sending all its management people and resources from Washington to Chicago as it would in bringing just the union negotiators to Washington. In view of the above, common sense alone dictates that the FLRA was not "clearly in error" in determining, based upon its unique experience, that travel and per diem expenses were consistent with the purposes of the Statute when the realities of the situation were fully considered. The FLRA also appropriately determined that "the payment of travel and per diem expenses would not only more nearly equate the status of union and management negotiators as contemplated by Congress but would also facilitate more effective union representation at the bargaining table, thereby implementing the purpose of the Statute, as reflected in Section 7101(a), to encourage collective bargaining in the Federal sector." *Interpretation and Guidance, infra.*

ARGUMENT

A. THE FLRA'S DECISION SHOULD BE AFFIRMED BECAUSE IT WAS NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW.

The CSRA provides that judicial review of FLRA decisions "shall be on the record in accordance with section 706 [of Title V]." 5 U.S.C. § 7123(c). Section 706, in turn, declares that agency action shall only be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). This section has been interpreted on numerous occasions as requiring the court to give great deference to an interpretation of a statute by the agency entrusted with its administration. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1970); *U.S. v. City of Chicago*, 500 U.S. 8, 10 (1970); *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

"Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Development Co. v. Int'l. Union of Elec., Radio & Machine Workers*, 367 U.S. 396, 408 (1961) *quoting Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 315 (1933), in turn *quoted in NFFE v. FLRA*, 652 F.2d 191 (D.C. Cir. 1981); and *Dept. of Defense, Army-Air Force Exchange Services, Ft. Dix, N.J. v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) *cert. denied sub nom., AFGE v. FLRA*, 102 S.Ct. 1443 (1982).

Thus, in the first cases brought against the FLRA under the CSRA, the judiciary has already clearly declared that the FLRA is entitled to great deferenec in interpreting Title VII of the Reform Act, and its interpretation of the Statute should be affirmed "unless there are *com-*

pelling indications that it is wrong." [Emphasis added] *Miller v. Youakim*, 440 U.S. 124, 125, n.25 (1979), *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969), *expressly followed in NFFE v. FLRA*, *supra*, and *DOD v. FLRA*, *supra*.

Significantly, where "the FLRA's construction of the statute is reasonably defensible, [the courts] are not free to reject it merely because we might decide differently if confronted with the question in the first instance." *See DOD v. FLRA*, *supra*, at n.121. This is true because "Congress intended the needed judgments to be made not by this court, but by the Authority." *Id.* at 1161. Particularly in light of the great deference due the FLRA, this Court should uphold its decision where, as here, petitioners' arguments constitute merely a difference in opinion with the FLRA over the meaning and scope of the terms "collective bargaining" and "official time" as employed in Title VII of the Act. As the Court of Appeals, D.C. Circuit, recently ruled in a similar case questioning an Authority interpretation of terms employed in the Reform Act: "The surface ambiguity of the central statutory distinction provides a further reason for us to defer to the considered judgment of the Authority." *DOD v. FLRA*, *Id.* Where, as in the instant case, several differing interpretations of "terms of art" employed in Title VII are available, the FLRA acts reasonably and correctly in choosing the interpretation it believes is most consistent with and best effectuates the overall purposes of the legislation. *EEOC v. Louisville & Nashville R. Co.*, 505 F.2d 610, 616-17 (5th Cir. 1974). It is particularly appropriate for the Court to be guided by the FLRA's understanding of the Congressional purposes underlying the Reform Act. *Power Reactor Development Co.*, *supra*, at 408.

Four Circuit Courts of Appeals have already ruled on the official time, travel and per diem issue now before

this Court. The Ninth Circuit in the case at bar, unanimously upheld the FLRA in *Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 672 F.2d 732 (1982). In so doing, the Ninth Circuit deferred to the judgment of the FLRA and held that the FLRA's interpretation "should not be rejected simply because a court might prefer another view. . . It is our determination that the Interpretation and Guidance under examination here is reasoned and supportable." *Bureau of Alcohol, Tobacco, and Firearms v. FLRA, supra*, at 735-6.

The Ninth Circuit decision is clearly consistent with the general rules employed by the courts in reviewing FLRA decisions. *Department of Defense v. FLRA, supra*, at 1162 n.121. In contrast, however, the Second and Eighth Circuits, in 2-1 decisions still under review (petitions for certiorari pending), and the Eleventh Circuit refused to defer to the FLRA's judgment. *Division of Military and Naval Affairs v. FLRA*, 683 F.2d 45 (2nd Cir., 1982); *United States Department of Agriculture v. FLRA*, 691 F.2d 1242 (8th Cir., 1982); *Florida National Guard v. FLRA*, No. 81-5466 (11th Cir., March 7, 1983).

In so doing, both panel Majorities, over vehement dissents, ruled that deference was not necessary in these cases because the FLRA was not interpreting its own statute but rather 5 U.S.C. § 5702 governing "official business". Thus freeing themselves of the "shackles" of 5 U.S.C. § 706's limited standard for judicial review, the Majorities and Eleventh Circuit Panel proceeded to reject the Authority's decision, *not* because the FLRA decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," but simply because they disagreed with the FLRA's reasoning.

Quite obviously, these decisions, rejecting the clearly set forth 706 standard of review and giving the courts free rein instead, constitute judicial sleight of hand

which should not be countenanced by the Supreme Court which has been steadfast in its view that the courts should defer to the regulatory agencies that Congress has plainly empowered with the authority to set policies and effectively administer their statutes.

The Second and Eighth Circuit Majorities and the Eleventh Circuit Panel did not comport with the generally accepted standards for review set forth at 5 U.S.C. §§ 706 and 7123 when they expressly ruled that they need not defer to *Interpretation and Guidance*, 2 FLRA No. 31 (1979). Rather, they quite wrongly assumed that the FLRA's brief reference therein to 5 U.S.C. § 5701 *et seq.* provided the Courts an escape hatch by which they could somehow exorcise themselves from the normal constraints of judicial deference. However, Second Circuit Judge Oakes made a direct response to this argument in his well-reasoned dissent in *Division of Miltary and Naval Affairs*, *supra* at 49-50, and correctly identified the errors implicit in that court's majority reasoning when he stated:

> This is simply not so. "Interpretation" of "official business" in section 5702(a) is at most secondarily involved. An employee travelling on official business is entitled under that statute to a per diem allowance. The FLRA simply made one brief reference to that statute in interpreting a provision of Title VII, 5 U.S.C. § 7131(a), authorizing "official time" for employees "representing an exclusive representative in the negotiation of a collective bargaining agreement." The FLRA's Interpretation and Guidance, 2 FLRA [No. 31] (1979), was issued pursuant to 5 U.S.C. § 7105(a)(1), requiring the FLRA to "provide leadership in establishing policies and guidance" so as to carry out the purpose of Title VII. It was issued after due notice, 44 Fed. Reg. 42778 (July 20, 1979), and hearing, *id.* at 76581 (Dec. 27, 1979) . . .

> Virtually the entire Interpretation is devoted to the legislative history of Title VII and section 7131. Only a single paragraph in the eight page Interpretation refers to 5 U.S.C. § 5701 *et seq.*[2]
>
> . . . [T]he FLRA's decision is "reasonably defensible" and should be upheld.

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[2] . . . A fair reading of the Interpretation and Guidance is that the FLRA made the determination whether employees on official time are entitled to payments for travel and per diem on the basis of section 7131(a) and Title VII, and then concluded that employees participating in negotiation activities under that section are on "official business" and entitled to the payment of travel and per diem under 5 U.S.C. § 5701 *et seq.*, which simply operates to provide the authorization to expend funds.

As is evident from even a cursory understanding of the workings of 5 U.S.C. § 5702, in reaching its decision the FLRA merely employed 5 U.S.C. § 5702 *ministerially*. In this regard, § 5702 clearly establishes that all federal employees will receive travel expense reimbursement when engaged in necessary travel related to official business. The Comptroller General has ruled that § 5702 rights attach to those functions that are deemed, *in the discretion of the Government*, to be in "the Government's interest." *E.g.*, 52 Comp. Gen. 97, B-140144, August 18, 1972 at p. 99. Prior to the passage of the Reform Act, the authority to determine whether negotiators were entitled to travel and per diem expenses was placed in the now defunct Civil Service Commission (CSC). *See*, § 25 of E.O. 11491. The Commission, having no statutory guidance whatsoever on this issue, established its own guidelines which were later looked upon with approval by the Comptroller General. *See*, 46 Comp. Gen. 21, B-156287 (July 12, 1966). Based on these CSC guidelines alone—without any statutory indications explaining the nature or extent of the Government's interest—

travel and per diem expense payments for union negotiators were normally deemed to be within the discretion of the Government to make. *Id.*

Under the Reform Act, at 5 U.S.C. § 7105(a)(I), the CSC's role was implicitly transferred to the FLRA. The FLRA, with a basis far more clearly grounded in statute than the CSC ever had to act upon this question, reviewed its Labor Statute under its role established by Section 7105 and determined that Congress had expressly found in § 7101(a) that the right of employees "to bargain collectively, and participate through labor organizations . . . in decisions which affect them—(A) safeguards the public interest and (B) contributes to the effective conduct of public business." Further, Congress itself specifically declared that "collective bargaining in the civil service [is] in the public interest"; a public interest that, like the Government's interest as an employer, "demands the highest standards of employee performance . . . and the efficient accomplishment of the operations of the Government." *Id.*

Without question, it was reasonable, *far* from arbitrary, and well within the Authority's discretion to determine—on the basis of 5 U.S.C. § 7101(a), not on the basis of § 5702 (as the 2nd, 8th, and 11th Circuits erroneously opined)—that Congress had found collective bargaining to be a function that was in the interest of the Government and, as such, a compensable activity under Sections 5702 and 7131 of Title V for union and management negotiators alike.

Once the FLRA determined that Congress intended in the Statute for such bargaining activities to be the equivalent of official government business for union and management negotiators alike, Section 5702 applies to mandate the payment of all necessary travel expenses in the same ministerial manner as it does for all official government travel.

Consequently, the key issue is not what was intended when Section 5702 was enacted—but rather what did Congress intend when passing Section 7131, Section 7101, Section 7114 and Section 7116(a)(5) and (b)(5) of the Statute. On these issues the FLRA is plainly entitled to deference as the administrative agency with the responsibility for implementing the new law. *Power Reactor Development Co. v. Intern'l Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961); *Dept. of Defense v. FLRA*, *supra*; *National Federation of Federal Employees v. FLRA*, 652 F.2d 191 (D.C. Cir. 1981). Moreover, the FLRA was acting squarely within its expertise when it examined the Labor Statute and its legislative history in arriving at these determinations.

Thus, it would be error, we submit, for this Court not to accord deference to the FLRA's construction of the Federal Service Labor-Management Relations Statute. By substituting its judgment for that of the Authority and rejecting the Authority's decision based upon mere disagreement with its reasoning, the Court would clearly be applying the wrong standard of review in this case. It is significant, as Judge Heaney of the Eighth Circuit panel readily recognized in applying the correct standard of review in his dissent, that: "Nowhere is it shown, however, that the FLRA's decision violates any mandate or policy expressed in the enabling legislation." *Supra* at 1252, n.2.

Thus, in concluding in his dissent that it was incumbent upon the Court to defer to the judgment of the FLRA in this case under the standard for review set forth at 5 U.S.C. §§ 706 and 7123(c), Judge Heaney correctly reasoned as follows:

> **The FLRA relied upon the express policies and purposes of the Act and the agency's consistent interpretation of the Act as being intended to equalize the positions of labor and management, subject to various express restrictions. The agency thus ap-**

> proved travel payments because they further the equalization trend, further the express purposes of the Act, and are not barred by any statutory restriction. Such analysis may not be the only plausible interpretation, but it is a reasonable one and is well within the scope of the agency's authority . . .
>
> The contrary conclusion reached in this case is not required by the statute or its legislative history, which is conceded to be silent. It is not required by prior administrative practice, which is itself erratic and inconsistent. Moreover, it is not justified by the policy arguments relied upon by the majority, unless this Court is empowered to freely substitute its judgment for that of the agency. In my view, when Congress broadly empowers an independent agency to regulate federal labor relations, courts should not interfere with that agency's policy determination absent a clear showing that the decision is unreasonable, exceeds its authority, or is contrary to law. No such showing has been made here. *Id.*

In view of the above, in the case at bar it is clear that this Court should defer to the FLRA.

B. THE FLRA'S FINDING THAT FEDERAL SECTOR NEGOTIATIONS CONSTITUTE "OFFICIAL BUSINESS" IS REASONABLY DEFENSIBLE AND SHOULD BE AFFIRMED.

The FLRA, as affirmed by the Ninth Circuit, recognized that travel and per diem expenses are generally authorized for federal employees under 5 U.S.C. § 5701 *et seq.* when they are "engaged in official business for the Government." *FLRA Interpretation*, 2 FLRA No. 31, at 5. The FLRA then scrutinized both the language of, and purposes behind, its enabling statute, the Federal Service Labor-Management Relations Act (FSLMR) and determined that union negotiators *required by law* to engage in federal sector negotiations (5 U.S.C. § 7114) are in fact engaged in official business (or official

travel)[1] if compelled to travel in order to accomplish such negotiations.

In so ruling, the FLRA correctly reviewed the legislative history of 5 U.S.C. § 7131 [2] (official time) as well as Congress' clear declaration that federal sector bargaining is in the public interest and in the best interest of the Government in efficiency, effectiveness, productivity, and amicable dispute resolution. The FLRA first noted that adoption of the House bill in the area of official time represented a significant departure from the past federal sector labor relations program under Executive Order 11491. A significant aspect of the Statute which departed from the Executive Order is Congress' specific threshold finding and statement of purpose that labor organizations and collective bargaining are in the public interest and promote efficient government. 5 U.S.C. § 7101.[3]

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[1] The United States Code actually establishes the general principle that the government will pay the travel expenses of employees who are either traveling on "official business," *see* 5 U.S.C. §§ 5702, 5704 and 5707(b)(1), *or* for "official travel," *see* 5 U.S.C. § 5707(a), General Services Administration Travel Regulations § 1-1.2, FPMR temp. Reg. A-11, Supp. 4, Attachment A (April 28, 1977).

[2] Section 7131 requires or authorizes the granting of "official time" to employees in three situations. Section 7131(a) expressly requires official time for "negotiation of a collective bargaining agreement . . . including attendance at impasse proceedings[.]" 92 Stat. 1214. Section 7131(c) empowers the Authority to require official time for employees participating in its proceedings except for those covered by subsection (a). Section 7131(d) requires that agencies negotiate official time for representational and other matters not covered under the earlier subsections. (Section 7131(b) requires that internal union business be conducted during a non-duty status.)

[3] Section 7101(a) states:

§ 7101. Findings and purpose.

(a) The Congress finds that—

The Statute's statement of findings and purpose properly served as an important factor which the FLRA relied upon in concluding that the term "official time" in § 7131(a) includes an agency duty to pay necessary and related travel expenses. By explicitly endorsing and encouraging collective bargaining, and finding it in the public interest, Congress clearly evidenced its recognition that official time spent in bargaining is in the interest of the government and equivalent to official government business.

The findings and purpose stated in § 7101 of the Statute[4] are in sharp contrast to the preamble in Executive

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(1) experience in both private and public employment indicates that the Statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) *safeguards the public interest*

(B) *contributes to the effective conduct of public business*, and

(C) *facilitates and encourages the amicable settlement of disputes* between employees and their employers involving conditions of employment; and

(2) The public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and *the efficient accomplishment of the operations of the Government.*

Therefore, labor organizations and collective bargaining in the civil service are in the public interest . . . [Emphasis added]

[4] The legislative history of 5 U.S.C. Section 7101 also reaffirms the import of its specific wording. The final language in Section 7101 came from the House version. The House Report described the meaning of Section 7101(a) this way:

Findings and purpose

Section 7101(a) sets forth the finding that collective bargaining in the Federal Service is in the public interest, in that

Order 11491, as amended. The Executive Order did not endorse collective bargaining. It did not find that labor organizations and collective bargaining are in the public interest. Nor did the Order specify that federal sector collective bargaining contributes to effective and efficient government. Congress unquestionably adopted the principle of collective bargaining in the Statute in a way never before recognized under the Order or in the private sector.

The FLRA reasonably construed § 7101 and § 7131(a) to indicate that official time spent by federal employees in collective bargaining is in the public interest and constitutes "official business for the government." *Interpretation and Guidance, supra* at 5. In this regard less than four months ago, the Supreme Court itself ruled that the "special responsibilities" and "special legal duties" of negotiating and administering a collective bargaining agreement and representing the interest of all employees in settling disputes and processing grievances, imposed by statute upon a public sector union, can indeed justify a finding that a public sector union is participating in the "official business" of the government. *Perry Education Association v. Perry Local Educators' Assn.*, 103 S.Ct. 948 (1983).

In *Perry* the Supreme Court ruled that the incumbent union representing Perry Township teachers could justify its access to the school mail facilities open only "to those who participate in the [school's] . . . official business." *Id.* at 959. The Court concluded that the union's access was in fact justified as "official business." *Id.* at 958, note 10. In the case at bar, in light of the clear context

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it safeguards employee rights and contributes to the effective conduct of public business by encouraging amicable resolution of employment-related disputes. Statutory protection of Federal employees' rights to organize and bargain collectively through labor organizations is in the public interest. H.R. Rep. No. 95-1403, 95th Congress 2d Sess. 38 (1978)

of the Reform Act (*e.g.*, §§ 7101, 7102(2), 7103(a)(9) and (12), 7106, 7113(c), 7114, 7116(a)(5) and (b)(5), 7131), there can be no doubt that federal unions should be deemed engaged in the official business of the government to an even greater degree than the public teachers' union in *Perry*, especially while participating in activities related to the legally imposed obligation [5 U.S.C. § 7121(a)] of negotiating collective bargaining agreements.

The Authority's reliance in its decision on 5 U.S.C. § 5701 *et seq.* was well placed in this regard. As previously stated, this portion of the United States Code establishes the general principle that the government will pay travel expenses to employees travelling on "official business," [5] *or* for "official travel." [6] Thus, as construed by the Comptroller General, travel expense reimbursement turns on whether or not the employee activity is in the interest of the government".[7]

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[5] *See* 5 U.S.C. § 5702, 5704 and 5707(b)(1).

[6] *See* 5 U.S.C. § 5707(a); General Services Administration Travel Regulations § 1-1.2, FPMR temp. Reg. A-11, Supp. 4, Attachment A (April 28, 1977).

[7] In its latest decision, B-156287 (June 15, 1981), the General Accounting Office (GAO) has held that its interpretations of the official time provisions of prior Executive orders have been superseded "to the extent of any conflict" with section 7131 of the Statute. In its decision B-156287 (CFR) (June 15, 1981) (attached hereto as Addendum E), GAO stated at 2:

> The enactment of Chapter 71, Title 5, as Title VII of the Civil Service Reform Act of 1978, Pub. Law No. 95-454, October 13, 1978 (92 Stat. 1111, 1192), provided a specific statutory provision—5 U.S.C. § 7131—for the use of official time in the labor-management area. This provision is more comprehensive and specific than the preexisting provisions of section 20 of Executive Order 11491, *supra*. In view of section 7135(b), providing for supersession of inconsistent provisions of the various Executive orders dealing with labor-management relations, we view section 20 of Executive Order 11491 as having been superseded by the specific provisions of section 7131 of Title 5, United

In its *Interpretation and Guidance, supra*, at 5, the FLRA correctly applied this standard as follows:

> . . . It is well established that such expenses are authorized when an employee 'is engaged on official business for the Government' (Chapter 57, Subchapter I—Travel and *Subsistence Expenses; Mileage Allowances*, 5 U.S.C. § 5701, *et seq.*). As already mentioned, Congress, in adopting the Statute, specifically found in section 7101(a) that collective bargaining 'contributes to the effective conduct of public business,' and that collective bargaining in the civil service [is] in the public interest.' Further, Congress expressly mandated in sections 7114 and 7116(a)(5) and (b)(5) that such negotiations be conducted in good faith by the parties involved (92 Stat. 1202, 1244). Thus, an employee, while negotiating a collective bargaining agreement as a union representative and while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on 'official business for the Government.'

In conclusion, the statutory grant of "official time" to bargain, and the § 7101 findings that collective bargaining is in the public interest clearly provide adequate basis for a finding that such negotiation time is in the best interests of the government.[8]

States Code. It follows, therefore, that our decisions interpreting the official time provisions of prior Executive orders have also been superseded by section 7131, to the extent of any conflict.

[8] As previously stated, the application of 5 U.S.C. § 5701 *et seq.* is purely ministerial in this case. The substantive finding that the activities herein constitute official business is based on the FLRA's analysis and interpretation of 5 U.S.C. § 7101 *et seq.*, and the proper exercise of its power to take any "actions as are necessary and appropriate to effectively administer the provisions of this chapter." 5 U.S.C. § 7105(a)(2)(I). Accordingly, the FLRA's finding is clearly entitled to deference as the Ninth Circuit ruled. *ATF, supra.*

C. OFFICIAL TIME STATUS AS PROVIDED IN 5 U.S.C. § 7131 IS ON DUTY STATUS AND THEREFORE INCLUDES PAYMENT OF NECESSARY TRAVEL AND PER DIEM EXPENSES.

It is most significant that if Congress had intended to place union negotiators in a special paid leave of absence status, it could easily have done so. Indeed, if a paid leave status had been intended, the term "leave" could have been specified as it was two pages later in the Act under the backpay revision in Section 5596(b)(1)(B), 92 Stat. 1216. On the other hand, in this regard the BATF relies primarily on one argument: Congress did not specifically say travel and per diem is an entitlement so Congress did not want these items provided for. This argument plainly fails, however, for the following reason: Since "official time" means "duty" status, there was clearly no need for Congress to further describe in detail any travel and per diem expenses as a requirement because they are automatically permitted for *any* on duty employee *who is required to accomplish his on-duty mission(s)*.

The FLRA ruling is fortified by the fact that agency management already treats federal employees who participate in collective bargaining on official time as if they are actually performing official government business. The official time which employees spend in collective bargaining is credited for accrual of annual leave, sick leave, reduction-in-force retention standing, and retirement.[9] Currently, while negotiating on official time, employees are correctly recognized as performing official government business in every respect except one—travel expenses. Petitioner has cited no Congressional intent anywhere in the Statute to justify this distinction. Indeed Congress clearly intended employee negotiators to

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[9] *See* Federal Personnel Manual Supplement 296-33, Subchapter 6, S6-1.5 Creditable Service; Federal Personnel Manual Supplement 831-1, Subchapter S 3-2.

be considered on "Paid time," the equivalent of official government business for all purposes.

In this regard, employees of the federal government are only authorized to be in one of three possible positions vis-a-vis their employer: (1) duty status; (2) off-duty; or (3) some form of paid or unpaid leave. The legislative development of the official time section demonstrates the constant dichotomy maintained by the House of Representatives between "official time" for various purposes on the one hand, and, on the other, the nonduty status required for conducting internal union business. Section 7131 of the Statute is identical to Section 7132 of H.R. 11280 as reported by the Committee on Post Office and Civil Service. All earlier versions of the section contained the contrasting provisions for "official time" and nonduty status. (See Section 7132 of H.R. 13, H.R. 9094, the Clay-Ford-Solarz Print Used for Markup, and H.R. 11280 as reported.)

So, too, rather than deciding to place union negotiators in some form of "paid leave" status as provided for in the Federal Personnel Manual at FPM Supplement 990-2, Subchapters S1-13, Congress expressly chose to place negotiators on official time. This decision by Congress to place union negotiators on official time—rather than opting to put them in a leave or nonduty status—establishes that such employees are in a duty status and are, therefore, entitled to travel and per diem expenses when the activities for which "official time" is authorized necessarily involve travel. Significantly, employees on official time continue to accrue their rights to all other forms of compensation and fringe benefits because they are in fact considered on duty and not on excused, or even paid, leave.

The FPM provides for numerous different forms of leave status. In its brief BATF has argued that union negotiators are no more entitled to travel and per diem payments than employees who, in the public interest,

participate in military funerals or vote. The analogy here drawn by the BATF is clearly wrong, however. The FPM provides that employees who participate in the above-described activities do so in an "excused absence" status and *not* in an official time/on-duty status. *See*, FPM Supp. 990-2, Subchapter 11. These activities are expressly authorized in Book 630 of FPM Supplement 990-2. Said Book is entitled "Absence and Leave" and does not include any activities performed on official time.

BATF mischaracterizes the FLRA reasoning by implying that the FLRA ruled that "paid time" always carries with it the right to travel expenses. The FLRA did not so rule. Instead the FLRA relied upon the statutory finding that collective bargaining is in the government's interest and merits "official time." Moreover, the examples cited by BATF do not involve "official time" under appropriate law or regulation but rather, as just stated, fall within a completely different status of leave called "excused absence." *See*, Federal Personnel Manual Chapter 630, Subchapter 11. Under the appropriate regulations, excused absences are permissible for various policy reasons, but *not* because such absence promotes the official business and interests of the government. Unlike "official time" to attend Impasse proceedings, etc., no federal statute certifies that blood donation constitutes the official business of the government. As such, excused absences cannot serve as precedent in the instant case.

BATF wrongfully insinuates that prior to the passage of the Reform Act travel and per diem payments by agencies to union negotiators were not made. This is simply not so. While travel expenditures were not expressly authorized under Executive Order 10988 (the Reform Act's predecessor), the Civil Service Commission (CSC) issued general guidelines under which the payment of travel expenses to employees serving as union representatives were entirely proper and authorized.

See, FPM Letter 711-5, August 1, 1966. The Comptroller General (CG), in turn, based on the CSC's submission of these proposed guidelines on June 24, 1966, *sua sponte* modified all its prior decisions denying travel and per diem. Significantly, the decisions so modified are the same decisions BATF relies upon in opposition to the FLRA's cogent determination that travel and per diem payments effectuate the purposes of the Statute.

In explaining his 1966 decisions to modify all prior CG opinions and sanction the CSC guidelines, Comptroller General Elmer B. Staats concluded:

> At the time our decisions B-156287, dated April 9, 1965, September 23, 1965, and January 28, 1966, which are referred to in your letter, were rendered there was neither a statutory provision, Executive Order, nor regulation or instruction of the Civil Service Commission prescribing standards or guidelines for determining when expenses of travel of employee organization representatives reasonably could be regarded as having been incurred primarily in the interest of the United States and, therefore, reimbursable from agency funds. The guidelines you now propose to issue in implementation of section 12 of the Executive Order establish necessary standards for a reasonable and uniform exercise of the discretionary administrative authority you consider essential to the fulfillment of the objective of employee-management cooperation as contemplated by Executive Order No. 10988. Therefore, otherwise proper payments of travel expenses of employee organization representatives that are made in accordance with those guidelines and supported by the required certification—and accompanying explanation —will not be questioned by our office in the absence of misrepresentation, bad faith, or arbitrary action in making the above prescribed certification. Our prior decisions in this area, cited above, are modified accordingly. CG Decision B-156287, 7/12/66.

Thus, the CG found the CSC guidelines proper and legal based only on the agency's discretionary determination that payment of travel expenses for union representatives was "essential to the fulfillment of the objective of employee-management cooperation as contemplated by Executive Order No. 10988." Significantly, the CSC guidelines gave great discretion to agencies in determining when such union representation activities could be considered "primarily in the interest of the Government" and payable. The CSC specifically found that travel expenses related to some labor relations activities should be paid for. These activities included joint labor-management cooperation committees and joint efforts concerning "prevention of accidents, reduction of absenteeism, improving communications, insuring equal employment opportunity, and maintaining employee productivity and morale." FPM Letter 711-5.

It is significant, if not controlling, that *all of the above "approved" topics are now negotiable matters under the expanded scope of bargaining permitted by the Reform Act, and therefore, are normally negotiated and addressed in collective bargaining agreements.* (Most contracts now include health and safety provisions, equal employment/affirmative action plans, progressive discipline provisions, counseling for employees who start to become unreliable, and various proposals such as flextime designed to improve employee morale and productivity.) Thus, even under the old CSC guidelines, most of the matters discussed in negotiations would be deemed primarily in the interest of the government because they naturally lead to increased production, improved morale, elimination of discrimination, a healthy and safe work environment, and the peaceful and timely resolution of disputes.

The CSC guidelines, drawn up during a time when most current subjects of bargaining were non-negotiable, still recognized that payment of travel expenses for em-

ployee representatives negotiating a labor agreement was permitted within the discretion of the employer agency. The CSC merely cautioned:

> As a general practice, travel expenses should not be paid to attend negotiation sessions for the purpose of negotiating an agreement . . . *the agency has the latitude to pay travel expenses* where the particular circumstances justify the payment. An agency, for example, may find that it would be in the primary interest of the Government . . . . FPM Letter 711-5. [Emphasis supplied]

On October 13, 1978, the Congress went one step further than the CSC and expanded the scope of bargaining to include all these matters previously deemed to be "primarily in the interest of the Government." In so doing, it further determined, expressly, that the right of employees to bargain collectively:

1. Safeguards the public interest. 5 U.S.C. § 7101 (a) (1) (A);
2. Contributes to the effective conduct of public business. *Id.* at (1) (B); and
3. The public interest demands the highest standards of employee performance and work practices to facilitate and improve the efficient operations of the Government. *Id.*, at (2).

In light of the above considerations, the Congress specifically found that: "Labor organizations and collective bargaining in the civil service are in the public interest." *Id.* Thus, on October 13, 1978, the Congress merely recognized and expanded upon the CSC's previous determinations set forth in FPM Letter 711-5 concerning the government's interest in labor-management relations. Based upon these express Congressional findings concerning the government's interest, the statute's provision on "official" time for negotiators, and its own responsibility to effectively administer the provisions of the Statute, the FLRA found that travel and per diem payments for negotiators already on official time was not only authorized but required.

Significantly, the CG and CSC determined that the CSC had the authority to authorize travel payments to employee organization representatives under "the Commission's responsibilities for giving guidance and technical advice to agencies under section 12 of the Order." FPM Letter 711-5. Likewise, without any doubt the FLRA, like the CSC before it, had the same authority under the Reform Act to issue its decision authorizing said payments under 7105(a)(1) which requires the Authority to establish "policies and guidance relating to matters under this chapter, and . . . be responsible for carrying out the purpose of this chapter."

D. THE FLRA'S DECISION ON OFFICIAL TIME EFFECTUATES THE PURPOSES OF THE STATUTE.

Reduced to its essence, BATF argues merely that the FLRA's decision will be expensive and, therefore, must be overturned. BATF Brief at 25-28. In truth, however, in view of all the circumstances involved, there is no evidence that the FLRA decision will cost any more money. Thus, as the FLRA has recognized in the past, under a system where consolidated negotiations at the single highest or national level are in the public interest and favored, *Veterans Administration*, 1 FLRA No. 55 (1979) and *Report on Labor Management Relations in the Federal Service* (1975), p. 35, it is necessary that the union's local representatives from all over the country appear. However, the centralized operations of the government allow most agencies to have all its master negotiators located at one location already (such as VA's central office in Washington, SSA's in Baltimore, and Justice's in Washington). Thus, assuming *arguendo* that travel and per diem for union negotiators were not authorized by this Court, the union—having to bear the entire travel burden—would be fully within its rights to insist, for example, that VA negotiations be held in a geographically centralized location, equally burdensome to both sides, such as Kansas City or Chicago. Thus, practically speaking, the VA would be required to spend just as much, or

more, money sending all its management people and resources from Washington to Chicago as it would in bringing just the union negotiators to Washington. In view of the above, common sense alone dictates that BATF's cost argument is a verbal "shell game" and the FLRA was not "clearly in error" in determining, based upon its unique experience, that travel and per diem expenses were consistent with the purposes of the Statute when the realities of the situation were fully considered. The FLRA appropriately determined that "the payment of travel and per diem expenses would not only more nearly equate the status of union and management negotiators as contemplated by Congress, but would also facilitate more effective union representation at the bargaining table, thereby implementing the purpose of the Statute, as reflected in Section 7101(a), to encourage collective bargaining in the Federal sector." FLRA *Interpretation*, *supra* at p. 6.

The Congress recognized, in § 7101(b), the "special requirements and needs of the Government" in enacting the system set forth in the CSRA. In addition to finding that bargaining was primarily or ultimately in the public interest, the Congress further evinced a desire for a balanced or equalized system with neither side being capable of exerting undue pressures upon the other. [124 Cong. Rec. H. 9633 (daily ed., Sept. 13, 1978), Comments of Rep. Udall concerning his compromise which subsequently passed in the House.] In this connection too, Rep. Clay, in discussing the proscription of official time for employees engaged in internal union business under Section 7132(b) of the House Bill (which was enacted as Section 7131(b) of the Statute) stated as follows: [10]

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization . . . . Activities that involve labor-management contacts are not included in this section . . . . Title VII imposes heavy respon-

[10] 124 Cong. Rec. H 9, 638 (daily ed. Sept. 13, 1968).

> sibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. [Emphasis added]

Significantly, as the FLRA found, "Additionally, it is not controverted that management representatives are uniformly paid travel expenses and per diem when engaged in the negotiation of a collective bargaining agreement on behalf of management, and Congress indicated its intent that similar prerogatives be accorded employees . . . ." *Interpretation* at p. 6.

Contrary to BATF's arguments, without the right to strike and, particularly, without the right to negotiate union security provisions, labor organizations in the federal sector are clearly at a severe disadvantage when confronted by abusive or hostile federal managers intent on "breaking" the union by extending negotiations and requiring heavy out-of-pocket expenditures by unions. In effect, management had no incentive to come to any agreements under the Executive Order. A fundamental concern reflected in the legislative history and in the Statute itself, equalizing the bargaining power of agencies and employee representatives, requires that management no longer be able to exert economic pressure at the table by protracting ngotiations. Prolonged negotiations and other abuse of the Executive Order's provisions were discussed during hearings on the various versions of the Statute in the 95th Congress. This abuse led first the House of Representatives and then the Conference Committee to reject (the Senate's) language explicitly based on Section 20 of the Executive Order with its limitations on official time and its consequent "tilting" of economic pressure in favor of management. Thus, when the overall picture is viewed accurately, BATF's slanted outcries of poverty and injustices are unwarranted and unrealistic. In fact, the FLRA's decision below perpetuates, promotes, and fosters

the intricately balanced system created by the Congress and actually helps avoid the severe pressures and restrictions BATF says concern it. Congress' rejection of Senate Bill § 7232 and its subsequent silence since the FLRA's decision on travel and per diem in O-PS-3 and 6 logically lead to the conclusion that Congress, having expressed no disapproval of the FLRA decision herein under scrutiny, experiences no such disagreement.

Despite BATF's broad arguments contra, the Court also should be keenly aware that the travel expense rules in the private sector are truly irrelevant in the case at bar and simply have no bearing on the FLRA's decision. The federal and private sectors are radically different. If Congress intended to treat federal employees like private sector employees it merely would have amended the NLRA to include the Federal government. Instead Congress enacted a substantially different, comprehensive labor relations scheme, unique to the needs of the Federal government. One dramatic difference relevant to the issue of official time, travel, and per diem concerns the scope of federal bargaining.

Thus, under the CSRA: salaries, performance standards, seniority, retirement, insurance, vacation time, sick leave, pensions, and holidays are all *non-negotiable*. It is crucial for our purposes that the Court understand that collective bargaining in the federal sector is largely confined to negotiating matters of mutually beneficial interest to management, labor, and the public, such as provisions promoting: arbitration, health and safety, affirmative action/equal employment, alcohol and drug rehabilitation, merit promotion, progressive discipline, whistleblower protections, retaliation-free personnel action, etc. "Management rights," a negotiable matter in the private sector, is explicitly protected in Section 7106 of the Reform Act. Strikes and work stoppages are also strictly prohibited. 5 U.S.C. Section 7116(b)(7); *PATCO v. FLRA*, No. 81-2135 (D.C. Cir. June 11, 1982).

Moreover, unlike the private sector where companies campaign intensely against unionization, the Statute requires that Federal agencies remain *neutral* in union elections.[11] It is illegal for a Federal agency to oppose unionization. Hence, when BATF refers continually to the private sector practice of rarely compelling a private employer to pay the "bargaining costs of its adversaries," it flagrantly ignores the special rules in the Federal government whereby unions are not viewed in the same "adversarial" light as in the private sector.

Another such vital distinction concerns union dues. In the private sector unions may negotiate a "union shop" or "agency shop" system whereby all employees must pay dues. 29 U.S.C. Section 158(a)(3). Such systems are illegal in the Federal government where there is an "open shop" and employees have a protected right *not* to join the union (5 U.S.C. Section 7102). The federal union is, therefore, legally obligated to represent members and non-members alike, yet without agency shop or even "service fee" arrangements, only members need contribute any money. At the same time, however, unlike private sector unions that have well-defined fair representation obligations, *see Archer v. Airline Pilots Assn.*, 102 LRRM 2827 (9th Cir. 1979), Federal sector unions' representation duties are arguably boundless.

Grievances in the Federal sector are themselves defined as any contractual complaint *and* "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(c). Moreover, despite the severe financial limitations already noted, federal unions are obligated to represent employees *outside* the grievance process and handle statutory appeals if the nonpaying, nonmember so

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[11] See *Dept. of the Air Force, Air Force Plant Representative Office Detachment 27, Fort Worth, Tx., and NFFE Local 1958 and AFGE Local 1361*, 5 FLRA No. 62 (4/17/81) for a detailed discussion of the background and legislative history of this unique federal sector rule.

requests. § 7121(e)(1). In a recent case, the FLRA has gone so far as to prosecute a union for breach of the duty of fair representation because the union charged non-members a nominal fee to join as plaintiff in a civil lawsuit—separate and apart from any grievance—brought by the union under its Legal Rights Fund (which is funded solely by its members). *AFGE and Social Security Administration*, 3-CO-2003 (case pending).

In view of the above, it is apparent that it is simply not reasonable to compare private and federal sector negotiation schemes in determining whether federal union negotiators are entitled to travel and per diem expenses necessarily incurred in fulfilling their bargaining obligations imposed by the Reform Act. Federal unions are clearly participating in the "official business" of the government while negotiating and administering bargaining agreements (*see* §§ 7101, 7114, 7121, 7131). [*Supra* at Argument B]. In addition, when viewed in a practical, real world sense, the BATF has actually not established that paying union negotiators' travel and per diem is one whit more expensive than the only other alternative—transporting and maintaining the Agency's negotiators and resources at an equally burdensome neutral site outside of the Agency's Central Office.

CONCLUSION

For the aforesaid reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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